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IN THE

Supreme Court of the United States

October Term, 1970
No. .....

RHEBA N. MCMILLAN,

Appellant,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

On Appeal From the Judgment of the Court of Appeal of the State of California, Second Appellate District, Division Three, and Numbered Therein 2d Civil No. 37641; Appellate Department of Superior Court No. Civ. A 12624; Municipal Court of the Pomona Judicial District No. 15521.

JURISDICTIONAL STATEMENT.

1. This jurisdictional statement is submitted in accordance with Rule 15 of the Supreme Court of the United States.

(a) Reports of the Opinions Delivered in the Courts Below.

On June 30, 1970, the Municipal Court of the Pomona Judicial District, County of Los Angeles, gave its judgment in unlawful detainer after trial by court regarding trustee's deed upon sale. Same is attached hereto and marked Exhibit "A".

On November 17, 1970, the Appellate Department of the Los Angeles Superior Court gave its Decision by Appellate Department, attached hereto as Exhibit "B".

On December 9, 1970, said Appellate Department gave its order certifying cause to Court of Appeal, attached hereto as Exhibit "C".

On December 15, 1970, said Court of Appeal gave its order denying transfer by Court of Appeal, attached hereto as Exhibit "D".

(b) Concise Statement of the Grounds on Which the Jurisdiction of the United States Supreme Court Is Invoked.

(i) The Nature of Proceeding and Statute Pursuant to Which It Is Brought.

Nature of proceeding is unlawful detainer. Action was brought by Appellee following purported foreclosure sale under power of sale in trust deed and alleged sale to Appellant. Said purported sale was made pursuant to California Civil Code Sections 2924 and 2924(b) following alleged default in payments by appellant and pursuant to California Code of Civil Procedure Section 1161(a) (2) and (3).

Appellee's demand for possession is dependent solely upon its claim of ownership as alleged by it in its complaint. Ownership is attacked here as being obtained through an unconstitutional deprivation of appellant's property without due process of law. Appellant attacks the manner in which respondent acquired such title. These facts are not in dispute. The issue is the constitutionality of the law under which respondent claims title, and seeks possession.

(ii) Date of Judgment Sought to Be Reviewed.

December 15, 1970—judgment of Court of Appeal denying transfer of case to it, thus upholding the judgment of said Appellate Department of the Superior Court of November 17, 1970 and of the said Municipal Court of June 30, 1970.

Time of Entry of Judgment: Said judgment was filed in the said Court of Appeal on December 15, 1970 and in said Municipal Court on December 22, 1970.

Order respecting rehearing in said Court of Appeal: None is permitted by California law and none therefore was requested.

Date of Appeal to Appellate Department of Superior Court: July 6, 1970.

Date of Application to said Appellate Department for Certification to Court of Appeal: November 19, 1970.

(iii) Statutory Provisions Believed to Confer on the United States Supreme Court Jurisdiction of This Appeal.

28 U.S. Code 1257 states that final judgments rendered by the highest court of the state in which a decision could be had may be reviewed by the United States Supreme Court as follows: (2) by appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution of the United States and the decision is in favor of its validity. (Note: All the California Courts hearing the matter, said Municipal Court, said Appellate Department of the Superior Court, and said Court of Appeal upheld the validity of the California foreclosure statute.)

28 U.S. Code 2101(c). An appeal (other than an appeal from a decision holding an act of Congress unconstitutional or from a decision from the District Court) shall be taken or applied for within 90 days after entry of judgment.

(iv) Cases Believed to Sustain the Jurisdiction.

The Appellate Department of the Los Angeles Superior Court at the time of the decisions which follow was the highest court of the state in which a decision could be had on appeal from a decision of the Municipal Court.

Robinson v. California, 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417.

Also see:

Smith v. California, 361 U.S. 147, 4 L. Ed. 2d 205, 805 S. Ct. 215;

Edward v. California, 314 U.S. 160, 86 L. Ed. 119, 62 S. Ct. 164.

Since the time of these decisions the California law permits the Court of Appeal to hear a case certified to it from the Appellate Department of the Superior Court, but if the Court of Appeal denies the transfer to it of such case, appellant can go no further. Under California Rules of Court 28(4) a petition for hearing "may not be filed after denial of transfer to a Court of Appeal after certification in a case within the original jurisdiction of a Municipal or Justice Court".

Under Rule 27 of said rules "The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause, except . . . "the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a Municipal or

Justice Court." In other words, no rehearing and no further action is permitted by California law after the proceedings followed by appellant in this case.

(v) Text of Statute of State Involved.

The validity of the following statutes is involved: 2924 and 2924(b) of the California Civil Code, 1161 (a) (2) and (3) of the California Code of Civil Procedure. Same are set forth in the Appendix at Exhibit E.

There are also attached hereto and set forth in the Appendix, the following:

Judgment of the said Municipal Court of June 30, 1970;

Decision by said Appellate Department of the Superior Court of November 17, 1970;

Order of said Appellate Department of the Superior Court, granting certification to Court of Appeal of December 9, 1970;

Order denying transfer by Court of Appeal of December 15, 1970.

(c) Questions Presented by the Appeal.

Are the said California Foreclosure Statute, 2924 and 2924(b) Civil Code, and unlawful detainer proceedings pursuant thereto under Code of Civil Procedure 1161(a) constitutional?

Do they deprive the home owner of his property without due process of law?

Should a home be sold under the California Foreclosure Statute before a judicial or other determination that the payments under the contract are actually in default?

Should the home be sold under the California Foreclosure Statute before the judicial or other determination of the sum due, if any, to the creditor.

Is a home owner entitled to the same protection as the wage earner?

The wage earner under the holding in *Christine Sniadach v. Family Finance Corporation of Bayview, et al.*, 395 U.S. 337, 23 L. Ed. 349, 89 S. Ct. 1820 is entitled to have the creditor get a judgment against him before his wages can be attached.

Is the home owner entitled to have the creditor get a judgment against him before the creditor can proceed to foreclose on his home at the Statutory Foreclosure Sale?

Can the home owner in the printed Trust Deed Instrument waive his right to the constitutional protection of a hearing upon notice or is he entitled to such hearing upon notice before his home is sold at the Statutory Foreclosure Sale?

When can the home owner question the charges made by the trustee and the lender under a Trust Deed?

Can he question these charges at a judicial or other hearing before the foreclosure is complete and the property sold?

Is the welfare home owner or other home owner entitled to the same protection that is afforded to the welfare recipient of a pre-termination evidentiary hearing before home is sold at the Statutory Foreclosure Sale?

Is the home owner entitled to a hearing before foreclosure just as a worker is entitled to a hearing before termination of unemployment insurance benefits?

Should the foreclosing creditor be required to prove up the default before the foreclosure sale?

(d) Concise Statement of the Case.

The questions herein raised were first raised in the pleadings as follows:

The complaint (page 2, lines 4 to 10, paragraph IV) alleged ownership of property in appellee.

Demurrer for uncertainty in paragraphs 2a to 2w questions the ownership of appellee and asks specific answers to specific questions as to how ownership was acquired. The demurrer was over-ruled.

The Answer denies appellee is entitled to possession. The answer in:

Paragraph (I) Denies appellee owned said property;

Paragraph (II) Alleges appellant is entitled to possession and is the owner;

Paragraph (III) The Answer in the Third Defense requests answer to interrogatories which were never answered either before the trial or thereafter; in the interrogatories appellant seeks to ascertain the facts on which appellee bases its claim of ownership. The Fifth Defense alleges appellee failed to secure any title to the property "as there was no hearing before the attempted sale of said property and no title thereto ever passed to the plaintiff" (appellee). The Sixth Defense says alleged sale of property on foreclosure is an attempt to deprive appellant of her property without due process of law, contrary to the 14th Amendment to the Constitution of the United States. The Seventh Defense alleges that the purported sale as conducted did not comply with the Statutory procedure of the State of California.

At the trial, the appellant raised the issues set forth in the Answer. The said Municipal Court gave judgment for possession of the property to appellee. The issues raised at the trial were the same issues set forth herein questioning the validity of the purported foreclosure sale since there was no pre-foreclosure hearing to determine whether any sums were due to the mortgagee before the appellant was deprived of her property and that said deprivation of property was without due process of law. The Municipal Judge said he felt this question should be reserved for a higher court. The question was squarely raised from the inception of the case and thereafter at all stages of the proceedings.

Thereafter notice of appeal to the said Appellate Department of the Superior Court was filed and the same matter was raised in the briefs and in the arguments before the Appellate Department and was decided in favor of appellee by the said Appellate Department. Thereafter the said Appellate Department of the Superior Court certified to the Court of Appeal that the question raised by appellant was an important question and in its certification order set forth the same point.

The Court of Appeal denied transfer of the case to it and refused to hear the matter.

(e) Grounds on Which It Is Contended That the Federal Questions Are Substantial.

(i) "Matters of Fact."

It is contended the federal questions herein are substantial because appellant herein was thrown out of her home by the marshal acting under the direction of the state court pursuant to the state statute.

Thousands of home owners are put out on the streets in California every year, by this one appellee alone. Countless other thousands of home owners are put out of their homes without any judicial or other hearing or notice thereof to determine whether the deprivation of property is constitutional. The methods used by the trustee who sold out appellant are a public and a shameful scandal. The largest newspaper in Los Angeles carried a front-page story on October 26, 1970, regarding the methods used in billing appellee among others with the headline, "Trustee's Two-Step billing in Foreclosures Raises U.S. Costs". This article shows in detail the double billing of Appellee which double bills are passed on to appellant and thousands like her if they want to rescue their property from the foreclosing creditor. These sharp practices were in effect during the very time involved in the foreclosure here.

The Los Angeles Times quotes a Mr. Jarvis of FNMA (appellee) as saying that Fairfield (Trustee on the Foreclosure herein) handles 200 to 300 foreclosures a month. The newspaper says this "indicates foreclosure costs grossing at least $500,000.00 a year to the owner of the Trustee Company. These oppressive double billing practices are carried on and protected by the California Statute. The creditor enforces payment by his helpless victims under the cloak of the majesty of law. By double billing practices the newspaper points out the owner of the Trustee Foreclosure Company herein grosses $500,000.00 a year with an overhead that includes the work of three employees. So one man can get rich, thousands of home owners are forced out into the streets. All this happens due to the activity of one creditor alone. This does not take into account the operations of all the other foreclosing

creditors in California or, for that matter, in the entire United States.

Multiplied thousands are put out of their homes every month in California alone without any supervision or jurisdiction exercised by the courts or any public administrative body. The foreclosing creditor makes his claim for any amount of costs, charges, penalties, interest, fees, late payments, as well as principal and other charges. In the event of a dispute as to the amount or an effort to find out what is the true amount due, as here, the California Statute affords no protection of due process. The creditor's fiat is final. He gives a 90-day notice of foreclosure. After the 90 days expires if he is not paid, every exaggerated charge or duplicate bill and excess amount of allegedly delinquent principal and interest, late charges and other swollen fees he sees fit to require, the creditor has the Trustee advertise the property for sale for 20 days and it then sells it. There is no equity of redemption. Thereafter, as here, the purchaser at the alleged foreclosure sale files an action for unlawful detainer. The State Judge gives a judgment and sends in the marshal who evicts the home owner.

Appellant contends that she is entitled to have a judicial determination of the question whether there has been a default and if so how much is due before a foreclosure sale can take place.

This matter is of substantial importance to every home owner in California, to every home owner in the entire country.

It would be a simple matter for the United States Supreme Court to require that there be a simple prove-up in the State Court that the payments under a Trust

Deed were in default and the amount due before a foreclosure sale takes place. There is no problem in requiring a landlord to prove he is entitled to take the possession from his tenant where there has been a non-payment of rent and this the landlord must do before he regains his possession of his rented property. Surely, the same protection should be given to a home owner who has a far greater stake in the property. Even a tenant cannot be put out until there has been a hearing in Court. Why then should an owner have his title taken from him before there has been a hearing in court to determine that the owner is actually in default in his payments. It would be eminently practical to require of every foreclosing creditor that he make a showing to a court that he is entitled to foreclosure before foreclosing pursuant to his own untrammeled fiat, unrestrained by any court of quasi judicial body. The U.S. Supreme Court in *Sniadach, supra* protected the wages of the working man from pre-judgment attachments. The working man's home is in the same class as his wages. He needs both. He needs his wages to live on and his home to live in.

The United States Constitution provides for the right of the people to be secure in their homes from unreasonable searches and seizures. Historically protection in our country was given against the quartering of soldiers in the homes of the people, but the attack of the creditor and his trustee upon the people's homes is much stronger. The creditor does not quarter himself in one or two rooms of the debtor's house. No, he throws the debtor out completely and all without due process; without the right of the debtor to be heard before the title is sold out from under him. It is ironic that many government programs encourage those who

would otherwise be unable to do so, to acquire a home, a stake in society, a shelter, a place they could call their own, and yet appellee, an agency of the United States Government in this case, is doing all it can contrary to the constitution to deprive appellant of that home.

Even the state law, the California law, gives special protections through its homestead statutes to the debtor against the just claims of creditors fairly and openly reduced to judgment, but the California Statute involved herein gives no protection against underhanded, under the-table, unscrupulous, sharp practices of the overcharging trustee and of any lender piling up unfair charges. Only the light of day in a fair and public court proceeding before foreclosure sale will put a stop to such practices.

Hard-working state trial judges have not taken the time to review the facts regarding these over-charges before foreclosure sale. In fact, they take the position that their legislature does not require it and so, they, too, become instruments of the oppression of the creditor and the trustee. They also, as here, side-step the issue, and say it should be determined by a higher court.

The creditor seeks to get his pound of flesh by crying that he is proceeding not under state law, but under the contract and that because there has been a default in payment the terms of the contract allow him to reenter and that the state law ameliorates rigorous terms of the contract and says he may only foreclose but the appellant denies that there has been a default under the terms of the contract and says the default should be first proved in court before the terms of the contract take effect and she loses her home.

Federal and state programs provide for the relief of the needy. Many needy people have been able to acquire homes due to the help of the Federal Housing Administration and other Federal Agencies. Now along come the unscrupulous and secure unjustified foreclosure, taking people's homes from them. In this instance a welfare mother has been deprived of her property without due process of law, and the cost of state and federal governments is multiplied because the welfare recipient has been thrown out of her home and she must pay greater sums in rent than she formerly paid in mortgage payments. It is also the extra illegal costs, late payments and charges, excessive fees, and other unfair financial demands of the creditor which often make it impossible for the debtor to catch up on his payments and lead the way to an unjustified and legally improper foreclosure.

Some debtors turn to God in prayer: a few have friends who will rescue them with loans; some may be able to refinance against the exorbitant charges, but the appellant here turns to the courts. The state courts have said they will afford her no remedy. The legislature is too far away and besides, the legislature with the approval of the governor has spoken. They have passed their unconstitutional law. There is nowhere to turn for justice and relief of oppression, but to this Honorable Court.

Some elements in our society have been enraged by the injustice perpetrated on the poor, the weak, and the helpless so that they have turned to extra legal methods, the arson, the riot, the demonstration, the parade, but the appellant turns to this Honorable Court to save her home. May this Honorable Court not fail her.

(ii) Matters of Law.

A few cases below set forth appellant's legal position that due process requires a hearing before the foreclosure sale:

Grannis v. Ordean, 234 U.S. 385, 394, 58 L. Ed. 1363, 1369, 34 S. Ct. 779 (1914). The fundamental requisite of due process of law is the opportunity to be heard.

Armstrong v. Manzo, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187 (1965). The hearing must be had at a meaningful time and in a meaningful manner.

Goldberg v. Kelly, 397 U.S. 254 (1970) forbade state termination of welfare benefits without a prior evidentiary hearing.

Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820. This case forbade taking of property under attachment before judgment.

Jarva v. California Department of Human Resources Development, No. C69, 350 ACW (ND Cal. 1970) holds there was a right to a hearing prior to termination of unemployment benefits.

Laprease v. Engel, 70-CV-50 (ND N.Y. 1970) held portions of the New York Replevin Statute were unconstitutional and that a hearing was required prior to seizure in the Replevin Action.

(f) No Statement Is Required.

(g) No Statement Is Required.

(h) There Are Hereto Appended, Copies of Opinions Heretofore Delivered in This Case.

(i) There Are Hereto Appended, All Judgments Rendered in This Case.

(j) There Are Hereto Appended a Copy of the Notice of Appeal Showing the Date It Was Filed and the Name of the Court Where It Was Filed.

CONCLUSION.

It was reported in a national magazine that on February 22, 1971, the U.S. Supreme Court agreed to hear a case challenging the constitutionality of state laws that permit seizures of personal property without a hearing. It may be these cases should be considered together.

There are many proposals in the Congress for the protection of the consumer and it is respectfully submitted that it is only fitting that the Judicial Branch of the Government continue to be in the forefront of the present movement in the country to protect the weak and the helpless and to insure that they are not unlawfully and unconstitutionally deprived of their property.

For all the above reasons, appellant respectfully submits that a hearing is necessary before foreclosure sale is held.

Dated: March 10, 1971.

RANDOLPH WELTNER,
Attorney for Appellant.

WELTNER, SHAYKIN & GORENFELD,
Of Counsel.

APPENDIX

EXHIBIT A.

Judgment—Unlawful Detainer After Trial by Court.

In the Municipal Court of Pomona Judicial District, County of Los Angeles, State of California.

Federal National Mortgage Association, Plaintiff, v. Rheba N. McMillan, et al., Defendants. No. 15521.

This cause came on regularly for trial on June 25, 1970, at 9:00 A.M. before the Honorable HOUSTON A. SNIDOW, Judge, plaintiff appearing by Attorneys WIENER AND WEISS, by ROBERT E. WEISS, Defendant RHEBA N. McMILLAN appearing by her attorneys, WELTNER, SHAYKIN & GORENFELD, by RANDOLPH WELTNER, and the court having heard the testimony and considered the evidence; damages having been waived, and the matter having been submitted;

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff, FEDERAL NATIONAL MORTGAGE ASSOCIATION recover from defendant RHEBA McMILLAN, restitution and possession only of those premises situated in the County of Los Angeles, State of California, and more particularly described as:

657 East Alvarado
Pomona, California,

damages and costs having been waived by plaintiff, and that execution issue herein at the time and in the manner provided by law.

Dated: Jun 30, 1970.

/s/ Houston A. Snidow
Houston A. Snidow
Judge.

EXHIBIT B.

Decision.

In the Appellate Department of the Superior Court of California, County of Los Angeles Superior Court No. CIV. A. 12624. Trial Court No. 15521.

Federal National Mortgage Association, Plaintiff and Respondent, v. Rheba N. McMillan, Defendant and Appellant.

On appeal from the Municipal Court of the Pomona Judicial District, County of Los Angeles, State of California. Houston A. Snidow, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Pomona Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed. Respondent to recover its costs on appeal.

MEMO.

Appellant's contention that sections 2924 and 2924 (b) of the Civil Code are unconstitutional overlooks the fact that the power of sale exercised by a trustee under a deed of trust is not derived from these sections but from the contract agreement in the deed of trust. The sections merely constitute limitations on such powers (*Davidow v. Corporation of America* [1936] 16 Cal. App. 2d 6, 13 [60 P.2d 132]; *Strutt v. Ontario Savings & Loan Ass'n* [1970] 11 Cal. App. 3d 547 [.... Cal. Rptr. ....]). The California law on power of sale by trustees has been upheld against the contention that it deprives a person of

property without due process of law. (*Curti v. Pacific Mortgage Guaranty Co.* [9th Cir. 1936] 87 F. 2d 42.) The constitutionality of Section 1161a of the Code of Civil Procedure was upheld by the California Supreme Court in *St. George v. Meyer* [1937] 9 Cal. 2d 161 [69 P.2d 993].

If such well recognized and established procedure as trust deed sales followed by unlawful detainer proceedings for possession and the law recognizing their validity is to be upset, and we are in no way suggesting that it should be, it should not be by this intermediate appellate court.

Nov. 17, 1970.

BY THE COURT.

WHYTE, Presiding Judge.
VASEY, Judge.
WONG, Judge.

EXHIBIT C.

Order Certifying Cause to Court of Appeal.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Federal National Mortgage Association, Plaintiff and Respondent, v. Rheba N. McMillan, Defendant and Appellant. Superior Court No. CIV. A. 12624, Municipal Court of the Pomona Judicial District No. 15521.

Pursuant to Rule 63(a), (b), and (c), California Rules of Court, and upon timely motion by appellant, we certify the transfer of the above-entitled cause to the Court of Appeal appears necessary to settle an important question of law.

The question so presented is:

> Are sections 2924 and 2924(b) of the California Civil Code unconstitutional as permitting a person to be deprived of his property without due process of law?

In our opinion, a copy of which is attached hereto, we upheld the sections and the procedure used for foreclosing trust deeds by trustee's sale, notwithstanding appellant's strong reliance upon *Sniadach v. Family Finance Corporation of Bay View* [1969] 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820].

Dated Dec. 9, 1970.

BY THE COURT.
WHYTE
Presiding Judge
VASEY
Judge
WONG
Judge.

EXHIBIT D.

Order Denying Transfer.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Federal National Mortgage Association, Plaintiff and Respondent, v. Rheba N. McMillan, Defendant and Appellant. 2d Civ. No. 37641, Superior Court No. CIV. A. 12624, Municipal Court of the Pomona Judicial District No. 15521.

THE COURT:

The record on transfer in the above entitled cause having been filed in this court on December 9, 1970, pursuant to certification made by the Appellate Department of the Superior Court of Los Angeles County, and this court having considered the matter of whether such cause should be transferred to this court for hearing and decision, now, therefore, it is hereby ordered that such transfer be and it hereby is denied.

Filed: Dec. 15, 1970.

EXHIBIT E.

California Civil Code § 2924. Transfer as Security, Mortgage or Pledge; Power of Sale, Restrictions on Exercise; Notice of Default and Election to Sell; Waiting Period; Notice of Sale.

Every transfer of an interest in property, other than in trust made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default, identifying the mortgage or deed of

trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) after the lapse of the three months the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that required by law for sales of real property upon execution. (Enacted 1872. As amended Code Am.1873-74, c. 612, p. 260, § 256; Stats. 1917, c. 204, p. 300, § 1; Stats. 1923, c. 374, p. 755, § 1; Stats. 1931, C. 764, p. 1605, § 1; Stats. 1933, c. 642, p. 1669, § 1; Re-enacted Stats. 1935, c. 650, p. 1802, § 1; Stats. 1939, c. 983, p. 2736, § 1.)

California Civil Code § 2924b. Request for Copies, Notices of Default and of Sale.

Request; recording; contents; form. Any person desiring a copy of any notice of default and of any notice of sale under any deed of trust or mortgage with power of sale upon real property, as to which deed of trust or mortgage the power of sale cannot be exercised until such notices are given for the time and in the manner provided in Section 2924 may, at any time subsequent to recordation of such deed of trust or mortgage and prior to recordation of notice of default thereunder, cause to be filed for record in the office of the recorder of any county in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any such notice of default and of sale. This request shall be signed and acknowledged by the person making the request, specifying the name and address of the person to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation thereof and the book and page where the same is recorded or the recorder's number and shall be in substantially the following form:

"In accordance with Section 2924b, Civil Code, request is hereby made that a copy of any notice of default and a copy of any notice of sale under the deed of trust (or mortgage) recorded ....., 19....., in Book ..... page ..... records of ..... County, (or filed for record with recorder's serial number ...., ... County) California, executed by..... as trustor (or mortgagor) in which ....., is named as beneficiary (or mortgagee) and ..... as trustee be mailed to ..... at .....

Name Address

Signature ....."

Recorder's duties. Upon the filing for record of such request, the recorder shall index in the general index of grantors the names of the trustors (or mortgagor) recited therein and the names of persons requesting copies.

Mailing notice. The mortgagee, trustee or other person authorized to record the notice of default, shall within 10 days following recordation of such notice of default deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing a copy of such notice with the recording date shown thereon, addressed to each person whose name and address are set forth in a duly recorded request therefor, directed to the address designated in said request, and at least 20 days before date of sale the mortgagee, trustee or other person authorized to make the sale shall deposit or cause to be deposited in the United States mail an envelope, registered and with postage prepaid, containing a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request therefor recorded, within the time herein provided.

Request in instrument; publication; service. Any deed of trust or mortgage with power of sale hereafter exceeded upon real property may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to any person a party thereto at the address of such person given therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as herein authorized. If any deed

of trust or mortgage with power of sale executed after September 19, 1939, except a deed of trust or mortgage of any of the classes excepted from the provisions of Section 2924 does not contain a request of the trustor or mortgagor for special notice at the address of such person given therein or does contain such request but no address of such person is given therein and if no request for special notice by such trustor or mortgagor in substantially the form set forth in this section has subsequently been recorded, a copy of the notice of default shall be published once a week for at least four weeks in a newspaper of general circulation in the county in which the property is situated, such publication to commence within 10 days after the filing of the notice of default. In lieu of such publication a copy of the notice of default may be delivered personally to the trustor or mortgagor within such 10 days or at any time before publication is completed.

Effect of request upon title or as notice. No request for copy of any notice filed for record pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property or be deemed notice to any person that any person requesting copies of notice has or claims any right, title or interest in, or lieu or charge upon the property described in the deed of trust or mortgage referred to therein. (As amended Stats. 1957, c. 1865, p. 3269, § 11; Stats. 1959, c. 425, p. 2362, § 1; Stats. 1959, c. 1890, p. 4456, § 2; Stats. 1961, c. 2218, p. 4567, § 1.)

California Code of Civil Procedure § 1161a. Circumstances Authorizing Removal of Person Holding Over After Notice.

In either of the following cases, a person who holds over and continues in possession of real property, after a three-day written notice to quit the same, shall have been served upon him, or if there is a subtenant in actual occupation of the premises, also upon such subtenant, as prescribed in Section 1162 of the Code of Civil Procedure, may be removed therefrom as prescribed in this chapter.

1. Where the property has been duly sold by virtue of an execution against him, or a person under whom he claims, and the title under the sale has been duly perfected.

2. Where the property has been duly sold, upon the foreclosure, by proceedings taken as prescribed in this code, of a mortgage, or under an express power of under whom he claims, and the title under the foresale contained therein, executed by him, or a person under whom he claims, and the title under the foreclosure has been duly perfected.

3. Where the property has been duly sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by him, or a person under whom he claims, and the title under the sale has been duly perfected.

4. Where the property has been duly sold by him, or a person under whom he claims, and the title under the sale has been duly perfected. (Added Stats. 1929, c. 393, p. 719, § 1. As amended Stats. 1941, c. 1095, p. 2789, § 1.)

Notice of Appeal.

In the Municipal Court of Pomona, Judicial District, County of Los Angeles, State of California.

Federal National Mortgage Association, Plaintiff, v. Rheba N. McMillan, Doe I through Doe V, Defendant. Case No. 15521.

To Federal National Mortgage Association, plaintiff and respondent, and to Wiener and Weiss, its attorneys:

Please take notice that Rheba N. McMillan appeals to the United States Supreme Court from judgment of Court of Appeal entered December 15, 1970, denying transfer to it of within case from Appellate Department of the Superior Court, County of Los Angeles, State of California, thus sustaining the judgment of said Appellate Department entered November 17, 1970, and the judgment of the Municipal Court of Pomona Judicial District, County of Los Angeles, State of California.

This appeal is taken under the following statutes: 28 United States Code 1257 and 28 United States Code 2101(c).

Dated: March 8, 1971.

/s/ Randolph Weltner
Randolph Weltner
Attorney for Appellant

Notice of Appeal.

In the Appellate Department of the Superior Court, County of Los Angeles, State of California.

Federal National Mortgage Association, Plaintiff and Respondent, v. Rheba N. McMillan, Defendant and Appellant. Case No. CIV A 12624.

To Federal National Mortgage Association, plaintiff and respondent, and to Wiener and Weiss, its attorneys:

Please take notice that Rheba S. McMillan appeals to the United States Supreme Court from judgment of Court of Appeal entered December 15, 1970, denying transfer to it of within case from Appellate Department of the Superior Court, County of Los Angeles, State of California, thus sustaining the judgment of said Appellate Department entered November 17, 1970, and the judgment of the Municipal Court of Pomona Judicial District, County of Los Angeles, State of California.

This appeal is taken under the following statutes: 28 United States Code 1257 and 28 United States Code 2101(c).

Dated March 8, 1971.

/s/ Randolph Weltner
Randolph Weltner
Attorney for Appellant

Notice of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Federal National Mortgage Association, Plaintiff and Respondent, v. Rheba N. McMillan, Defendant and Appellant. 2d Civ. No. 27641, Superior Ct. NO. CIV. A. 12624, Municipal Court of the Pomona Judicial District NO. 15521.

To Federal National Mortgage Association, plaintiff and respondent, and to Wiener and Weiss, its attorneys:

Please take notice that Rheba N. McMillan appeals to the United States Supreme Court from judgment of Court of Appeal entered December 15, 1970, denying transfer to it of within case from Appellate Department of the Superior Court, County of Los Angeles, State of California, thus sustaining the judgment of said Appellate Department entered November 17, 1970, and the judgment of the Municipal Court of Pomona Judicial District, County of Los Angeles, State of California.

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/s/ Randolph Weltner
Randolph Weltner
Attorney for Appellant

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IN THE

Supreme Court of the United States

October Term, 1970
No. .....

RHEBA N. MCMILLAN,

Appellant,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellee.

On Appeal From the Judgment of the Court of Appeal of the State of California, Second Appellate District, Division Three, and Numbered Therein 2d Civil No. 37641; Appellate Department of Superior Court No. Civ. A 12624; Municipal Court of the Pomona Judicial District No. 15521.

MOTION TO DISMISS OR AFFIRM.

Pursuant to the provisions of Rule 16, paragraph 1, subparagraphs (a) and (b), of the Rules of the Supreme Court of the United States, the appellee respectfully moves this Honorable Court to dismiss the above entitled appeal on the grounds that the federal question sought to be reviewed was not expressly passed on and that the judgment rests on an adequate non-federal basis or, in the alternative, to affirm the judgment of the lower Court upon the basis that any deprivation of property that may have occurred was the direct and indirect result of private action, not state action.

Nature of the Statutes of the Civil Code Challenged and Judicial Construction Thereof.

> "Appellant's contention that Sections 2924 and 2924(b) of the Civil Code are unconstitutional overlooks the fact that the power of sale exercised by a trustee under a deed of trust is not derived from these sections, but from the contract agreement in the deed of trust. The sections merely constitute limitations on such powers."

The language hereinabove quoted is taken directly from the Memo Decision of the Appellate Department of the Superior Court of Los Angeles County. Such decision and the memo contained therein are accurately reproduced in appellant's Jurisdictional Statement and set forth as Exhibit "B". The Court's attention is invited to the fact that the lower court viewed Sections 2924 and 2924(b) as "limitations" setting forth the fact that the power of sale is not derived from the sections, but rather from contract and has in fact been limited by the Legislature.

The appellee contends that this view of the law is the construction of the challenged statutes as determined by the judiciary of the State of California, and that this interpretation is sustained by the cases cited within the decision [Appellant's Ex. "B"], *Davidow v. Corporation of America,* (1936) 16 Cal. App. 2d 6, 13; 60 P. 2d 132; *Strutt v. Ontario Savings and Loan Association,* (1970) 11 Cal. App. 3d 547, 90 Cal. Rptr. 73. This position is further strengthened by an examination of the history of the challenged sections, which shows the first reference by the Legislature regarding the exercise of a power of sale in a mortgage or deed of trust to have been by legislative amendment of Sec-

tion 2924 in 1917, as well as a review of early California decisions which clearly show the use of the power of sale in private contracts as early as 1863, *Kidd v. Teeple,* (1863) 22 Cal. 255, and the fact that the statutes have force solely as procedural limitations becomes even more readily apparent and certain.

Appellee further contends that this Court is bound by the interpretation and construction placed upon state statutes by the weight of judicial authority in the courts of the states. The cases of *Guaranty Trust Co. v. Blodgett,* 287 U.S. 509, 7 L. Ed. 463, and *Kingsley Corporation v. Regents of U of N. Y.,* 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 support this contention.

Sniadach v. Family Finance Corporation of Bay View Distinguished so as to Show Absence of Decision of Federal Question and an Independent Non-Federal Basis of Decision.

There appears throughout the whole of the majority opinion in *Sniadach v. Family Finance Corporation of Bay View,* 396 U.S. 337, 89 S. Ct. 1820, authored by Mr. Justice Douglas, with a concurring opinion authored by Mr. Justice Harlan, (which case is relied heavily upon by appellant), a recurring reference made to a deprivation of the *use* of the garnished portion of the petitioner's wages by an *in rem seizure* of the wages. Throughout these opinions the theme is the need for notice and an opportunity for a hearing as requisite to the fundamental concept of due process prior to depriving the debtor of his property or its *unrestricted use.*

By following the statutory procedure as prescribed by Sections 2924 and 2924(b) of the California Civil Code, the appellee was unable to assert a right to the

possession and unrestricted use of the property at 657 Alvarado Street, Pomona, California, (the property which appellant formerly owned). For the convenience of the Court, a brief review of the proceedings as set forth within the deed of trust and limited by Sections 2924 and 2924(b) are set forth herein:

1. A notice of default is recorded in the office of the County Recorder.

2. Within ten days of said recording, notice is given trustor (appellant herein).

3. For a period of three months from such recording, trustor has the absolute right to reinstate upon payment of installments in default and fees and charges as provided for by contract, but limited by statutes in question.

4. At the expiration of the three-month period set by statute, notice of sale of the property is advertised once a week for three weeks. Notice is mailed to trustor (appellant), posted upon the property and at a public place within the city or judicial district within which the sale is to be cried.

5. On the date designated within the notice of sale, sale is cried by trustee or trustee's agent publicly in accordance with the notice of sale provided for by statute.

If it is the trustor's desire, as it was in the case at bar, *without interference* she remains in possession of the premises during the entire time as hereinabove described. She may not be removed by the beneficiary (appellee herein) until after the sale and the next procedural step is successfully completed.

After sale, the successful bidder at the said sale (appellee-beneficiary herein) in order to obtain possession of the property in question must give notice pursuant to Section 1161a of the Code of Civil Procedure, which said section will be hereinafter discussed.

After notice, if the former owner (appellant herein) remains in possession, pursuant to the applicable code sections, an unlawful detainer action must be filed with the clerk of the court, a summons and complaint must be served upon the former owner in a manner necessary to give *in personam* jurisdiction and if no responsive pleading is filed, the matter must be proved up judicially; or in the alternative, if a responsive pleading is filed by the former owner, the matter is at issue and before the former owner (trustor-appellant) may be removed from possession, a full hearing must be had on the matter, including an attack upon all the acts of the trustee and, for that matter, the attack may go as deeply as the initial note itself which ran with the deed of trust foreclosed under the power of sale. As will be further discussed, the California courts have long recognized that even though title in the unlawful detainer proceeding may not typically be attacked, in this very specialized situation, that is, title derived from trustee at trustee's sale, title may always be attacked. As viewed by appellee, if the meaning of Sniadach is principally a deprivation of *use* or *unrestricted use* pending a full hearing, Sniadach is not only to be distinguished herein, but it is totally inapplicable.

Section 1161a(3) of the California Code of Civil Procedure and Judicial Interpretation Thereof by Leading Cases Show It to Be a Full and Meaningful Hearing Providing Within the Procedure an Adequate State Ground for Decision.

Several leading California cases will clearly reveal the interpretation of the proceedings under Section 1161a(3) (said section being correctly set forth by appellant in her Jurisdictional Statement at paragraph four on page 11 of the statement as part fo Exhibit "E" thereof) and equally will reveal several misconceptions apparently entertained by the appellant as set forth at paragraph one of page 10 of the Jurisdictional Statement as a clear misstatement of the prevailing law. The appellant's statement is:

> "Multiplied thousands are put out of their homes every month in California alone without any supervision or jurisdiction exercised by the courts or any public administrative body."

Quoting from the case of *Kessler v. Bridge,* 161 Cal. App. 2d Supp. 837, 327 P. 2d 241,

> "Thereafter, in 1929, Section 1161a was added to the Code of Civil Procedure to provide for the removal of persons who continued in possession of real property following a sale if 'the title under the sale has been duly perfected', in these instances, (1) where a sale results from an execution against the possessor, or (2) the foreclosure of a mortgage executed by the possessor, or (3) foreclosure under the terms of a deed of trust. *American National Bank v. Johnson,* (1932) 124 Cal. App. Supp. 783 & 786, 112 P. 2d 916, recognized that Code of Civil Procedure Section 1161a applies to situations where 'strictly speak-

ing' there is landlord/tenant relationship. Tenancy is not a necessary incident to a sale and three-day notice to deliver up possession does not create a tenancy.

"Code of Civil Procedure 116a covers other instances where dispossession by regular procedures is preferred to self-help. No doctrine of estoppel (to attack plaintiff's title) (Notation ours) is involved comparable to that between landlord and tenant. (The legislature thereby being interpreted as having removed the doctrine of attornment as an impediment to defending an action of unlawful detainer under 1161a(3), C.C.P.) (Notation ours) Thus, upon a purported foreclosure sale under a trust deed it is competent to assert in an action under Section 1161a(3) that the trust deed was not in default, even though the finding to such effect depends in part upon equitable estoppel of the beneficiary (Altman v. McCollum, (1951) 107 Cal. App. 2d Supp. 847, 236 P. 2d 914); and the validity of the sale and of the trustee's deed was held to be so directly in issue in unlawful detainer that the judgment therein was *res judicata* (Seidell v. Anglo California Trust Co. (1942) 55 Cal. App. 2d 913, 132 P. 2d 12)."

The opinion then continues to state the *Seidell* case, *Supra,* is authority that lack of consideration for a note was a legal issue to be determined under unlawful detainer, and the *Altman v. McCollum* case, *Supra,* stands for the holding that Section 89 of the Code of Civil Procedure has expressly conferred upon municipal courts the authority to consider equitable defenses in suits under Section 1161a. The *McCollum* case is again

cited in 1959 in the case of *Kartheiser v. Superior Court,* 174 Cal. App. 2d 617, 345 P. 2d 135 which recognizes that where the trustee has not followed the steps provided for by the instrument and limited by the statutes (Section 2924 and 2924(b)) in making the sale his deed passes only vulnerable title to the purchaser. *Kartheiser, Supra,* and the aforementioned two cases were again cited in *Crummer v. Whitehead,* 230 Cal. App. 2d 264, 40 Cal. Rptr. 826, (1964) wherein it was stated,

> "Although this was an action in unlawful detainer brought pursuant to Section 1161a, appellant was entitled to dispute the validity of the trustee's sale and place respondent's title in issue."

It is thus strongly, but respectfully, urged upon the Court that the courts of California have clearly defined the meaning of Section 1161a(3) and that said construction is binding upon this Court, *Guaranty Trust Co. v. Blodgett, Supra, Kingsley Corp. v. Regents of U. of N. Y., Supra.* It is further urged that the record of the proceedings before the Municipal Court of the Pomona Judicial District clearly demonstrates that the appellant raised in issue not only the compliance of the trustee with the provisions of the deed of trust and the limitations of the statutes in conducting the sale, but the very issue of the default itself. It is most strongly asserted that the appellant had a full and meaningful hearing which would be encompassed by any thoughtful definition of due process of law. Thus, the judgment rested solidly upon an entirely adequate state ground.

The Private Nature of the Conveyance of Title by the Trustee Under the Trustee's Sale Which Should Be Seen as Diametrically Opposed to State Action.

As stated in *Kiernan v. Multnomah County (C.C.)*, 95 Fed. 849,

> "The Fourteenth Amendment has reference exclusively to state action and not to any action by individuals. It is a prohibition upon the state 'to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' or which shall 'deprive any person of life, liberty, or property without due process of law.' It prohibits state legislation in violation of these rights. It does not refer to any action by private individuals. (Virginia v. Rives, 100 U.S. 313; 25 L. Ed. 667; U.S. v. Cruikshank, 92 U.S. 542 (23 L. Ed. 588); Civil Rights Cases, 109 U.S. (3) 11, 3 S. Ct. 18 (27 L. Ed. 835). Otherwise, every invasion of the rights of one person by another would be cognizable in the federal courts under this amendment."

As stated in *Davidow v. Lachman Bros. Inv. Co., et al.*, 76 F. 2d 186, Circuit Court of Appeals, 9th Circuit (1935),

> "The Kiernan case was cited with apparent approval by the Supreme Court in Barney v. City of New York, 193 U.S. 430, 431, 440; 24 S. Ct. 502; 48 L. Ed. 737, 741. See also, Seattle Electric Co. v. Seattle R & S Ry. Co. (C.C.A.), 185 F 365, Martin v. Holbrook (C.C.), 157 F 716."

The above statement succeeded the following opinion in the *Davidow* case, *Supra,*

> "It is clear from the allegations of the bill and from the argument advanced on behalf of appel-

lant that the claim of violation of due process of law is based solely on the actions of the various appellees in proceeding as they have under the power conferred by the deeds of trust and under what is asserted to be an erroneous interpretation of the statutes in question. (Sections 2924 and 2924(b) of the Civil Code) (Notation ours) Neither the State of California nor any of its agencies or officers is charged with depriving appellant of his property without due process of law."

As heretofore stated, the procedure of selling property at trustee's sale following default as conferred by deed of trust exists independent of statutory authority in California and was created by consensual agreement—through private substantive law and common usage. The procedural limitations upon its absolute exercise have been placed thereupon by the legislature through Sections 2924 and 2924(b) of the Civil Code, but this does not alter the fact nor the state of the law that the trustee's sale is a private act. The appellee contends that a private act which is the result of the exercise of a private right conferred by contract does not raise a federal question under the Fourteenth Amendment and that therefore the case at bar is not within the jurisdiction of the United States Supreme Court.

Conclusion.

On September 23, 1970, the Court of Appeal of California, Fourth District, Division 2, stated, in *Strutt v. Ontario Savings and Loan Association,* 11 Cal. App. 3d 552, 90 Cal. Rptr. 70,

"Plaintiff's suggestion that Civil Code Section 2924 which permits foreclosure without actual notice to the current record owner violates due process of law is without merit."

The Circuit Court of Appeals, 9th Circuit, in *Curti, et al. v. Pacific Mortgage Guaranty Co., et al.*, 87 F. 2d 42, stated,

> "The 'due process' clause is not violated by the provisions of Section 2924."

And this Court in *Scott v. Paisley,* (1926) 271 U.S. 632; 46 S. Ct. 591, 70 L. Ed. 1123 recognized that one may confer a power of sale and that a purchaser from the party conferring the power need not be notified of the exercise of the power when the Court said,

> "So a purchaser of land on which there is a prior security deed (which had been previously equated with a trust deed) (Notation ours) acquires his interest in property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of the power. And Section 6037 (a section of the Georgia Code) (Notation ours) neither deprives him of property without due process of law nor denies him the equal protection of the laws."

The *Scott* case was also cited in *Lancaster Security Investment Corporation v. Kessler,* 159 Cal. App. 2d 649, 654-655, 324 P. 2d 634 (1959), which ultimately came before this Court on appeal, 358 U.S. 306, 79 S. Ct. 345, whereupon the appeal was dismissed and the court treating the appeal as a writ of certiorari the petition was denied. *Lancaster, Supra,* was later cited with approval in *Strutt v. Ontario Savings and Loan Association,* 11 Cal. App. 3d 547, 90 Cal. Rptr. 70 (1970).

If the private acts of the trustee in the foregoing cases were sustained as due process of law, how much more compelling is the implicit fairness of the procedure followed by the appellee in the instant case wherein there was no dispossession of the appellant until after a full adversary hearing was held after personal service of summons and complaint, at which hearing every point and question of which she now complains was raised by her counsel under authority of these statutes and judicial interpretations thereof and which were judicially determined against her.

Appellee therefore moves this Honorable Court to find that the private actions of the Appellee led to a full and meaningful hearing on all issues which was decided on adequate state grounds and, therefore, dismiss this appeal with costs to appellee; or, in the alternative, that this Honorable Court uphold the finding of the Appellate Department of the Superior Court of Los Angeles County that the challenged sections merely prescribe limiting procedures which were followed by appellee and that the judgment of the lower court be affirmed.

Dated: April 9, 1971.

Respectfully submitted,

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